UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2475

DELPRO COMPANY

v.

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, AFL-CIO; LOCAL LODGE OF BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, AFL-CIO; and NATIONAL MEDIATION BOARD OF THE UNITED STATES OF AMERICA

(D.C. Civil No. 81-103)

JOHN TAYLOR, individ. and as representative of Delpro Company, DAN LENTZ, individ. and as representative of Delpro Co., DAN MILLER, individ. and as representative of Delpro Co.

v.

JACK WEATHERLOW, individ. and Vice Chairman, Brotherhood Railway Carmen Local Affiliate

(D.C. Civil No. 81-106)

DELPRO COMPANY,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Argued April 2, 1982

Before: GIBBONS, SLOVITER and BECKER,
Circuit Judges

(Filed April 13, 1982)

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OPINION OF THE COURT

GIBBONS, *Circuit Judge.*

This appeal arises out of a labor dispute involving a wholly owned subsidiary of a company which is itself owned primarily by a group of railroad companies. Based upon this corporate relationship and the services performed by the appellant, the district court found it to be a "carrier" as defined in the Railway Labor Act, 45 U.S.C. §151 *et seq.*, and thus subject to the jurisdiction of the National Mediation Board. We affirm.

I.

On August 20, 1980, the Brotherhood Railway Carmen of the United States and Canada (BRC) requested that the National Mediation Board (NMB) investigate a dispute concerning the representation of employees at Delpro Company (Delpro). Before determining the representation issue, the NMB issued a Determination of Jurisdiction on October 1, 1980, in which it found Delpro to be a carrier within the meaning of the Railway Labor Act and thus subject to its jurisdiction. 8 NMB No. 2 (1980). Two weeks later the NMB denied a Delpro petition for reconsideration, 8 NMB No. 16 (1980), and later proceeded to conduct an election among certain of Delpro's employees that resulted in NMB certification of the BRC as their representative.

Following the denial of the petition for reconsideration, Delpro brought suit in the United States District Court for the District of Delaware seeking declaratory and injunctive relief against the NMB. After first denying the NMB's contention that it lacked subject matter jurisdiction to review the NMB's determination of jurisdiction, the court dismissed the action for failure to join the BRC as defendants. *Delpro Co. v. National Mediation Bd.*, 509 F. Supp. 468 (D.Del. 1981). Delpro sued again, on March 11, 1981, joining the BRC and

seeking to set aside the NMB's certification of BRC. The following day the BRC filed a separate action to enjoin Delpro from refusing to bargain in good faith. Following consolidation of these actions, the district court, on August 7, 1981, granted summary judgment in favor of the BRC declaring Delpro to be a carrier. *Delpro v. Brotherhood Ry. Carmen*, 519 F.Supp. 842 (D.Del. 1981). On August 28, 1981, it enjoined Delpro to bargain with the BRC. This appeal by Delpro followed.[1]

II.

Both the NMB and the BRC argued in district court, and urge here, that the NMB's determination of its own jurisdiction in this case is not reviewable. The district court rejected that argument, 509 F.Supp. at 472-75, and we do also. Whatever the limitations may be upon judicial review of NMB decisions concerning the division of employees into appropriate classes or crafts or concerning the selection of a ballot for use in a representation election,[2] judicial review of NMB decisions concerning its own jurisdictional authority is not barred. *International Longshoremen's Ass'n v. North Carolina Port Authority*, 463 F.2d 1, 3 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972); *United States v. Feaster*, 410 F.2d 1354, 1361-62 (5th Cir.), *cert. denied*, 396 U.S. 962 (1969). Although statutory policy may preclude review of determinations necessarily incident to the NMB's undisputed duty to resolve representation disputes, a decision concerning the Board's own statutory power to act

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1. Motions by Delpro to stay the injunction pending appeal were denied by the district court on September 4, 1981, and by this court on September 27, 1981.

2. *See* Brotherhood of Railway and Steamship Clerks v. Ass'n for the Benefit of Non-Contract Employees, 380 U.S. 650 (1965); Switchmen's Union v. National Mediation Board, 320 U.S. 297 (1943).

at all should be subject to review absent some clear statutory prohibition.[3] We also agree with the district court, 519 F. Supp. at 845-46, that if the NMB looked to the relevant factors in the administrative record, the court should not disregard the Board's conclusions.[4] And although the court has the power to apply its own interpretation of the statute, the construction of the statute by the administering body charged with administering it is generally entitled to deference.[5] We add only that such deference is not necessarily due when the administrative agency has taken inconsistent positions in the past or when an agency is determining the scope of its own jurisdiction.[6]

III.

The first two general purposes enumerated in the Railway Labor Act are:

> (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; . . .

45 U.S.C. §151a (1976). Disputes arising among a carrier's employees as to who represents such employees in labor negotiations are to be investigated and resolved by the NMB. 45 U.S.C. §152, Ninth. Since the Act applies

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3. *See* 5 U.S.C. §§701-02 (1976) (provisions of Administrative Procedure Act concerning judicial review of agency action and individual rights to such review).

4. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 414-16 (1971).

5. *E.g.*, FCC v. WNCN Listeners Guild, 450 U.S. 582, 598 (1981).

6. National Industrial Sand Ass'n v. Marshall, 601 F.2d 689, 698-99 n.32 (3d Cir. 1979).

only to carriers, any company subject to NMB's jurisdiction must fall within the definition of "carrier." That definition reads, in relevant part:

> The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body judicial or otherwise, when in the possession of the business of any such "carrier": . . .

45 U.S.C. §151, First.

Delpro advances three reasons why it should not be found a carrier subject to the jurisdiction of the NMB: (1) the statute's use of "carrier" in the singular form excludes companies that are owned or controlled by a group of carriers; (2) ownership *or* control shall be read as ownership *and* control, and Delpro is not in fact so controlled; and (3) Delpro's services do not satisfy the function requirement of the statute. We discuss each of these contentions in turn.

A.

Delpro is one of four wholly owned maintenance subsidiaries of the Trailer Train Company, and its business operations are limited to repair of railroad cars owned by Trailer Train. The stock of Trailer Train is in turn owned by twenty-nine operating railroads, the trustees of two former operating railroads and one freight forwarding company. Trailer Train was originally

formed, and still functions, as an owner of a pool of railroad flatcars that are leased only to Trailer Train shareholders. Nearly all of the directors of Trailer Train are senior officers of the railroads owning the stock of Trailer Train. Its car contracts with the railroads assign the responsibility for maintenance of the leased equipment to Trailer Train — maintenance done in substantial part by Delpro and Trailer Train's other maintenance subsidiaries.

Since the stock of Trailer Train is held almost entirely by railroad companies indisputably qualifying as carriers, the district court concluded that Delpro is indirectly owned by a group of carriers by railroad and that such ownership by more than one carrier falls within the meaning of the statute. 519 F. Supp. at 847-48. The statute governing construction of federal statutes, 1 U.S.C. §1, both in its present version and in the version in effect when the Railway Labor Act was enacted, permits singular words to be read to include the plural unless there is some contrary indication in the context.[7] That rule of construction is especially apt when such interpretation is necessary to carry out the obvious congressional intent. Delpro points to other provisions of the Act that employ both the singular and plural of "carrier" as evidence that Congress intended only the singular in the provision at issue here.[8] These provisions, however, concern the representation of, disputes among, and agreements

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7. The present version states, "In determining the meaning of any Act of Congress, unless the context indicates otherwise — words importing the singular include and apply to several persons, parties, or things; . . ." Before 1947, it stated, "In determining the meaning of any Act or resolution of Congress, words importing the singular may extend and be applied to several persons or things; . . ." See First National Bank v. State of Missouri, 263 U.S. 640, 657 (1924).

8. See 45 U.S.C. §§151, Sixth; 152, Second, Sixth, Ninth, and Eleventh.

between carriers and their employees — not relationships of ownership or control. That Congress elsewhere contemplated the possibility of groups of carriers having representation and labor problems in common does not suggest that Congress also contemplated — and deliberately excluded — the possibility of ownership or control of a company by a group of carriers. We agree, to the contrary, with the district court, 519 F.Supp. at 848, that the Act's purpose of avoiding interruption of the operations of carriers would not be furthered by the reading of "carrier" suggested by Delpro. Excluding a company indirectly owned or controlled by a group of carriers while including companies indirectly owned or controlled by a single carrier simply makes no sense, since the potential for disruption to commerce by rail could be as great or even greater in the former case.

B.

Delpro also contends that despite the Act's definition of "carrier" as "any company which is directly or indirectly owned *or* controlled by . . . any carrier" (emphasis supplied), actual exercise of control is necessary — *i.e.*, "or" should be read "and." In support Delpro has cited two earlier NMB decisions that look to factors beyond mere ownership such as the degree of integration between the activities of the parent and subsidiary companies and whether the employees of a subsidiary are employees of the parent. *Eastern Aviation Services, Inc.*, 5 NMB 53 (1970); *Great Lakes Airlines, Inc.*, 4 NMB 5 (1961).

It is indeed the case that these decisions reject mere ownership (direct or indirect) as a sufficient condition to satisfy the "owned or controlled" requirement for NMB jurisdiction. This NMB precedent on the jurisdictional reach of the Act, however, is no bar to a reading of the statute by the district court and by this court according

to its plain meaning. After finding that Delpro is indirectly owned by a group of carriers by railroad, the district court went on to consider "the alternative test of being controlled by a group of carriers by railroad," 519 F.Supp. at 848, and concluded that this test was also satisfied. Since we likewise view the tests of ownership and control as truly alternative tests, we need not consider the question of exercise of control.

C.

The final barrier to NMB jurisdiction suggested by Delpro is that the repair and maintenance work done by Delpro employees does not satisfy the function test found in 45 U.S.C.§151, First: "and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad." As Delpro would have us read this language, a carrier must perform a service with respect to some preliminary or subsequent stage of handling property to be transported by railroad — *i.e.*, the transportation or receipt or elevation or storage, etc. of that property *before* or *after* it is transported by railroad. According to Delpro, the district court's description of the function test as "the performance of a service in connection with the transportation of property by railroad." 519 F.Supp. at 848, in effect ignores the statutory mandate that Delpro must itself be directly involved in the transportation, receipt, elevation, storage, etc. of the property to be transported by railroad. Appellant's Brief at 30-34.

This parsing of the statutory language is somewhat plausible, but we cannot overlook the evident intent of the statute. The use of both "transportation" and "transported" cannot be meant to exclude those performing such essential services as repair work connected with

the transportation of property by railroad.[9] It is clear that the statute means to extend the definition of "carrier" past those involved in the transportation of property by railroad to those also involved in the receipt, delivery, elevation, etc. of that property. The inclusion of these other jobs along with that of transportation itself evidently required the inclusion of the word "transported" to make the intent clear — *e.g.*, services in connection with the receipt of property transported by railroad. Had it not been for the inclusion of these other job categories, the redundancy of "transportation . . . of property transported by railroad" would undoubtedly have been eliminated.

Thus, we endorse the district court's reasoning that inasmuch as maintenance workers employed directly by a carrier would unquestionably be covered by the Railway Labor Act, so also should those workers employed by a subsidiary such as Delpro that is indirectly owned by a group of carriers. 519 F.Supp. at 848-49.

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9. *Cf.* Despatch Shops, Inc. v. Railroad Retirement Board, 153 F.2d 644 (D.C. Cir. 1946) (maintenance subsidiary of railroad company found to perform vital service "in connection with transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad," for purposes of defining an "employer" under the Railroad Unemployment Insurance Act, 45 U.S.C. §351). It is instructive to note the inclusion of "passengers" in this definition necessitated separating the job of transportation from the jobs of receipt, delivery, etc. in wording the statute. In so doing, Congress took the opportunity to place "property" in the same phrase as "passengers," thereby eliminating the redundancy found in the Railway Labor Act.

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IV.

The judgment appealed from will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

OPINIONS BELOW

MEDIATOR'S REPORT

CASE NO. CR—5031

Title *Representation-Carmen (mechanics), employees of Delpro Company. Applicant-BRC*

Fredericksburg, Va.
Sept. 10, 1980

Number of employees involved 137

Application Dated	August 20, 1980
Case Docketed	August 27, 1980
Date Case Assigned to Board Representative ..	September 2, 1980
Place Case Set	Bear, Delaware
Date Case Set	September 9, 1980
Commenced Handling	September 9, 1980
Craft or Class	Carmen (mechanics), Apprentice & Helpers
Incumbent	None
Applicant	BRC
Carrier	Delpro Company
Representatives:	
Delpro Company	Ray Schoonhoven, Attorney Seyfarth, Shaw, Fairweather & Geraldson
BRC	A.F. D'Avanzo, Grand Lodge Deputy

Dominic Maiese, National Representative, and, Wm. H. Harker, Jr., Regional Director, of the Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, were also present for the meetings of 9-9-80. It is not their intention to intervien. They merely wanted to enter a position on the record so to speak; that position being that the NMB did not have jurisdiction.

SEPTEMBER 9, 1980:

Meetings were held this day with the above named reps of the Company, BRC and IUMSW of A at the Company's office in Bear, Delaware.

The primary question for this investigation is whether or not the NMB has jurisdiction. While on the property, all procedures necessary to conduct an election if warranted were completed.

Delpro Company is a wholly owned subsidiary of Trailer Train Company.

Mediator Samuel J. Cognata

(Continued)

MEDIATOR'S REPORT (Pg. 2)

CASE NO. CR—5031

Title *Representation-Carmen (mechanics), employees of Delpro Company. Applicant-BRC*

Washington, D.C.
Sept. 10, 1980

Number of employees involved _____

Trailer Train Company (TTX) owns and leases a fleet of various types of railroad flat cars. TTX has six wholly owned subsidiaries, two of which also own and lease freight cars. They are Railbox Company and Railgon Company. There are four subsidiaries whose sole function is to maintain and repair the freight cars owned by TTX, Railbox and Railgon. TTX also contracts out repair work to more than thirty (30) independently owned shops. These four companies are Delpro Company, Calpro Company (located in Mira Loma, La.), Hamburg Industries, Inc. (located in Hamburg, S.C.), and Acorn Industries, Inc. (located in Jacksonville, Fla.) All the above were incorporated in the State of Delaware.

TTX is owned by thirty-one (31) railroads and Transway International Corporation which is a freight forwarding company. The Board of Directors of TTX is composed of 44 senior level officials of the owning carriers. These officials also serve on the boards of directors for all of the subsidiaries. The officers of TTX, specifically the President and Vice Presidents of Finance, Equipment and Fleet Management, and, the General Council, serve in similar capacities with the subsidiaries. None of these officers are affiliated with a railroad.

Although separate financial data is kept for TTX and each subsidiary, a consolidated balance sheet is published in the annual report of the TTX which is prepared by Peat, Marwick, Mitchell & Co., C.P.A.'s, Chicago, Illinois. An expansion program currently underway at Delpro is being financed by $1,000,000.00 in revenue

bonds issued by the State of Delaware. However, the $18,000,000.00 used to establish Delpro in 1979 was TTX money.

The Management Service Division of TTX assigns repair work to subsidiaries. There is no specific contract between TTX and any subsidiary for such work but, all maintenance and modification programs are planned for ten years forward by TTX. Additionally, light repairs are normally performed, as per AAR standards, by the railroads using the cars at the time such repairs are needed.

There is no doubt that the work in question, the maintenance and repair of freight cars, is work usually done by carmen on railroads, and, if done by a carrier, would certainly be work subject to the Railway Labor Act.

Mediator Samuel Cognata

(Continued)

MEDIATOR'S REPORT (Pg. 3)

CASE NO. CR-5031

Title *Representation-Carmen (mechanics), employees of Delpro Company. Applicant-BRC*

Washington, D.C.
September 10, 1980

Number of employees involved _____

There are no unions representing employees of TTX proper. Two of the repair subsidiaries, Hamburg Industries and Calpro Company, have units of production and maintenance employees represented under NLRB certifications by the IBT and the USWA, respectively. There is also another company in the Bear, Delaware, area, P&R Railcar, Inc., a division of North American Car Company, doing the same work as Delpro, which has a similar NLRB certification.

The Board has clearly stated that neither decisions by the I.C.C. or R.R.B., regarding what is a carrier and thus, whose employees are covered by each respective law, are not controlling under the Railway Labor Act. The facts relative to Delpro are that its employees are covered by Railroad Retirement Act. As to the I.C.C., TTX only reports to it pursuant to a pooling order (I.C.C. Finance Docket #27589 and Docket #27590), only its rates; and this is for informational purposes. TXX, in the pooling order, is specifically noted not to be a carrier.

In summation, TTX does not operate as a carrier by rail. It merely owns and leases to rail carriers a fleet of freight cars. However, TTX is owned and controlled by thirty-one rail carriers which benefit directly by using TTX. For example, a railroad using a Railbox boxcar does so at a cost which, on the average, represents 25% of the railroads freight revenue dollar. That same car would cost an average of 52% of the freight revenue dollar if railroad owned.

The I.C.C. says TTX is not a carrier, yet the Railroad Retirement Board has covered its employees (and those of all its subsidiaries) under the Railroad Retirement Act.

Notwithstanding, existing NLRB certifications on certain TTX subsidiaries, there is a direct link between TTX and most of the major railroads. It is within the province of the Board to determine if there is sufficient basis, given the facts, to take jurisdiction.

Mediator Samuel Cognata

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

CASE NO. R-5146
(FILE NO. CR-5031)

DETERMINATION OF JURISDICTION

October 1, 1980

In the Matter of the Application of the

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA

alleging a representation dispute to exist pursuant to Section 2, Ninth, of the Railway Labor Act

DELPRO, INC.

On August 20, 1980, the Brotherhood Railway Carmen of the United States and Canada (BRC) filed an application pursuant to Section 2, Ninth, of the Railway Labor Act, as amended, 45 U.S.C. S152, Ninth, alleging the existence of a representation dispute involving employees of Delpro, Inc. (Delpro) denominated as "Carmen-Mechanic." Said application has been assigned NMB File No. CR-5031 for purposes of investigation.

At the time the application was received, these employees were not represented by any individual or organization.

During the course of the Board's investigation, issues arose concerning whether Delpro is a "carrier" within the meaning of the Act. On the basis of information received during the course of its investigation, including a field investigation, the Board finds as follows:

ISSUE

The issue before the Board is whether Delpro is a "carrier" within the meaning of Section 1, First, of the Act.

CONTENTIONS

Delpro contends that it is not a carrier within the meaning of the Act.

BRC contends that Delpro is a carrier.

FINDINGS OF FACT

I.

Delpro's sole business is repair and maintenance of railroad freight cars owned by Trailer Train Company (TTX), and two of TTX's wholly-owned subsidiaries, Railbox Company and Railgon Company. Delpro is located in Bear, Delaware.

II.

Delpro is aiso a wholly-owned subsidiary of TTX. In addition to Delpro, TTX owns three other companies which repair and maintain railroad freight cars: Calpro Company (Mira Loma, LA); Hamburg Industries, Inc. (Hamburg, SC); and Acorn Industries, Inc. (Jacksonville, FL).

III.

TTX owns and leases a fleet of various types of railroad flatcars and boxcars under a pooling arrangement sanctioned by the Interstate Commerce Commission (ICC) in Finance Docket Nos. 27589 and 27590, decided August 1, 1974.

IV.

TTX is owned by 31 railroads (all carriers within the meaning of the Railway Labor Act) and one freight forwarder. TTX's board of directors consists of 44 senior of-

ficials of the owning carriers, who also serve as directors of each of the subsidiaries.

The principal officers of TTX are also officers of Delpro. The officers are not employees of any of the owning carriers.

Employees of Delpro are covered by the Railroad Retirement Act.

V.

TTX was created as a means of increasing the availability of freight cars and reducing the costs associated with purchase, lease, repair, and maintenance of freight cars, through pooling of resources.

ICC approval was required because pooling is prohibited unless it will increase service to the public or economy of operation without unduly restraining competition.

When TTX was created, it financed car purchases through an agreement obligating the stockholders to accept joint and several liability for all payments; by requiring individual stockholders to purchase subordinated notes; and by subordinating TTX's obligations to its stockholders to its obligations to investors in its equipment securities.

Any "profit" earned by TTX is rebated pro rata to the stockholders, based upon the amount of business each stockholder transacted during the year. This is in line with the intention to provide cars at lowest-possible cost through pooling.

VI.

TTX is obligated to maintain all pool cars, and the railroads are prohibited from making more than ordinary running repairs.

VII.

Carriers must be stockholders in TTX to participate in the pooling arrangement, but need not be stockholders to participate in the Railbox pool.

VIII.

The ICC found that TTX was not a common carrier itself in its decision cited above.

DISCUSSION

Section 1, First, of the Railway Labor Act provides:

> The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and *any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad which operates any equipment or facilities or performs any service* (other than trucking service) *in connection with the transportation,* receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage and handling of property transported *by railroad,* and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": Provided, however, That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line oper-

ated by electric power falls within the terms of this proviso. The term "carrier" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to carrier where delivery is not beyond the tipple, and the operation of equipment or facilities therefor, or any of such activities. (Emphasis supplied)

II.

The Interstate Commerce Act (ICA) provides, in pertinent part:

(1) Carriers subject to regulation

The provisions of this chapter shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment;

. . . . . .

From one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only insofar as such transportation takes place within the United States. (49 U.S.C. § 1 (1)

The term "carrier" is defined as:

The term "common carrier" as used in this chapter shall include all pipe-line companies; express companies; sleeping car companies; and all persons, natural or artificial, engaged in such trans-

portation as aforesaid as common carriers for hire. Whenever the word "carrier" is used in this chapter it shall be held to mean "common carrier." (49 U.S.C. S1(3) (a))

III.

It is apparent from the wording of these two statutes that the scope of the ICA is narrower than that of the RLA. Whereas the ICA contains a definition of "carrier", the RLA incorporates that definition and adds others. The Board therefore concludes that the ICC finding that TTX is not a carrier under the ICA, is not conclusive on the NMB if TTX meets any of the other possible definitions of the term "carrier" under the RLA.

IV.

TTX is directly owned and controlled by 31 carriers subject to both the ICA and the RLA. Officials of these carriers constitute its board.

TTX was created by these carriers in order to increase their available supply of railroad cars while lowering the cost of those cars. The alternative to creation of TTX was for each carrier to purchase and service additional cars.

Delpro is a wholly-owned subsidiary of TTX, whose only function is maintenance and repair of the cars owned by TTX. Officers of TTX are officers of Delpro.

V.

The Board concludes that both TTX and Delpro are carriers within the meaning of Section 1, First, of the RLA. Both are owned and controlled by rail carriers, either directly or indirectly. Both exist solely to facilitate rail transportation by supplying or maintaining equipment to be used by rail carriers, which equipment historically has been owned and maintained by rail carriers.

CONCLUSION

The Board has jurisdiction over Delpro, Inc. The application in File No. CR-5031 is hereby docketed as NMB Case No. R-5146.

A Board Representative will be assigned to complete the investigation.

By direction of the NATIONAL MEDIATION BOARD.

/s/ ROWLAND K. QUINN, JR.

Rowland K. Quinn, Jr.
Executive Secretary

cc: Mr. James E. Laramy
Mr. Ray J. Schoonhoven
Mr. O. W. Jacobson
Mr. Thomas A. Woodley
Mr. Anthony F. D'Avanzo

RKQ/dca

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

CASE NO. R-5146

DENIAL OF PETITION

October 15, 1980

In the Matter of the Application of the

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA

alleging a representation dispute to exist pursuant to Section 2, Ninth, of the Railway Labor Act

DELPRO, INC.

On August 20, 1980, the Brotherhood Railway Carmen of the United States and Canada (BRC) filed an application pursuant to Section 2, Ninth, of the Railway Labor Act, as amended, 45 U.S.C. S152, Ninth, alleging the existence of a representation dispute involving employees of Delpro, Inc. (Delpro) denominated as "Carmen-Mechanic". Said application was initially assigned NMB File No. CR-5031 for purposes of investigation, and has now been docketed as Case No. R-5146.

At the time the application was received, these employees were not represented by any individual or organization.

During the course of the Board's investigation, issues arose concerning whether Delpro is a "carrier" within the meaning of the Act. On the basis of information received during the course of its investigation, including a field investigation, the Board determined that Delpro, and its parent corporation Trailer Train Company (TTX) were "carriers" within the meaning of Section 1, First, of the Act. Determination of Jurisdiction, 8 NMB No. 2 (1980).

Immediately following issuance of the Board's Determination, counsel for Delpro requested that the Board

reconsider its Determination on account of alleged errors of fact and law, and requested a hearing on the question of the Board's jurisdiction. By letter dated October 2, 1980, Delpro was afforded the opportunity to present prima facie showing that the Board's Determination was erroneous. The Board reserved judgment on the necessity for holding a hearing pending receipt of such submission. (8 NMB No. 6)

Delpro filed its Petition for Reconsideration of Determination of Jurisdiction, including affidavits and supporting exhibits, on October 8, 1980. Such materials have been made part of the record in this case, and have been reviewed and considered.

I.

Delpro does not dispute any of the relevant facts found by the Board in its Determination. Delpro does point out that Delpro is independently administered on a day to day basis, and has its own labor relations policies.

Delpro asserts that the reason all of its business is with TTX is because TTX has given it a volume of work which utilizes all of Delpro's personnel and facilities.

Delpro asserts that the directors of TTX are primarily involved in authorization of equipment and financing, and that the stock-holders of TTX have "no voice in this or any other TTX matter", and "play no part in the establishment or administration of . . . management policies." Delpro further asserts that the relationship between TTX and its participating carriers is circumscribed by the terms of their contracts.

Finding no dispute as to the facts recited in the Determination of Jurisdiction, the only question is whether the additional facts asserted by Delpro are sufficient to warrant a change in the result reached in the Determination. With respect to the limit on Delpro's capacity to perform work or other customers, the reasons presented do not alter the basic fact that Delpro does 100% of its

business with TTX. No showing has been made that Delpro desires or seeks other customers, or is dissatisfied with the present arrangement, or would perform work *not* connected with rail transportation even if it had other customers.

The Board cannot ignore the legal and fiduciary obligations of a corporation's board of directors, or the rights of its shareholders. The board of TTX consists of senior officials of the shareholders-carriers. It is unrealistic to assume that those directors authorize contracts between TTX and their "home carriers" which are free market arms-length transactions, when the stated reason for creating TTX was to benefit the carriers financially. TTX is a captive of the railroads which own and control it.

The additional asserted facts present no grounds for reversing the Determination of Jurisdiction or conducting a hearing, and no showing of factual error on the Board's part has been made by Delpro.

II.

As an asserted error of law, Delpro states that the Board has not followed the procedures in S3.503-3 of the Representation Manual, which provides *procedural guidelines for Board Representatives* to aid them in conducting field investigations where jurisdiction is an issue. The Manual does not provide rules of law for determining jurisdiction; rather, it provides guidance to Board Representatives for use in gathering facts for consideration by the Board. The Manual is not binding upon the Board itself, as indicated by the Notice on the title page.

Because the Determination of Jurisdiction was made by the Board itself, and because the Board Representative properly utilized the procedures contained in the Manual in his investigation, this assertion by Delpro provides no basis for reconsideration.

III.

Relying upon *Great Lakes Airlines, Inc.*, 4 NMB 5 (1961) and *Eastern Aviation Services, Inc.* 5 NMB 53 (1970), Delpro asserts that the Board erred in finding that TTX and Delpro were carriers under the RLA, because it relied on "mere ownership" to find jurisdiction.

In *Great Lakes*, the Board declined to assert jurisdiction over a wholly-owned subsidiary of an airline which performed all of the airline's maintenance, and also performed maintenance for other carriers. In *Eastern Aviation Services*, the Board declined to assert jurisdiction over a wholly-owned subsidiary of Eastern Airlines, stating:

> It is the opinion of the Board that the appropriate test for Board jurisdiction in cases where a subsidiary operation is wholly-owned by a carrier concededly covered by the Railway Labor Act is the degree of integration between the activities of the subsidiary enterprise and its parent. Factors indicative of such integration would include the degree of commonality in the employment terms and conditions of the work forces involved, as well as the degree of autonomous direction of its own operations by the subsidiary. In this age of corporate conglomeration, the bare fact of ownership, standing alone, is not determinative of the jurisdictional question. (4 NMB at 55).

The Board has undertaken an extensive evaluation of its jurisdictional standards. Recent jurisdictional determinations of this Board have been made in light of changing corporate relationships and increasing use of contractors to perform work integral to rail and air transportation. Thus, in *Missouri-Illinois Central Industries, Ltd.*, 7 NMB No. 256 (1980), the Board found that a company which braced and secured freight in transit on railroads performed work subject to the Act. In *Ground Services, Inc. (San Diego)*, 7 NMB No. 266 (1980), the

Board found that a company which provided fleet service work for airlines performed work subject to the Act. In *Boeing Airport Equipment, Inc.*, 7 NMB No. 193 (1980), the Board found that a company which provided baggage handling to an airline performed work subject to the Act. In each case the Board examined the degree of control exercised by a carrier over an independent contractor.

In the instant case, Delpro asserts that there is no control, and that ownership is not determinative. Such an argument overlooks the duties of the board of directors, the directors' relationships to the stockholders, and the stockholders' motives in forming TTX.

It further overlooks the financial incentives to the carriers, who created a 90,000-car pool rather than buy and maintain their own rolling stock. The fact that available cars are directly related to the carriers' ability to transport freight shows how important TTX is to its owners.

To the extent that *Great Lakes* may be read to stand for the proposition that the Board will not exercise jurisdiction over subsidiaries of carriers and over the subsidiaries' employees, the determination in *Great Lakes* is hereby overruled. Furthermore, the Board finds that *Eastern Aviation Services* is distinguishable from the instant case, in that EAS was not providing equipment or services integrally-related to the parent corporation's business. Delpro and TTX, on the other hand, perform work which is vital to the carriers' business. *Chesapeake and Ohio Ry. Co.*, 4 NMB 215 (1962), also cited by Delpro, is likewise inapposite, since the Board found in that case that the subsidiary's main business was real estate development.

CONCLUSION

Based upon all of the foregoing, the Board finds that Delpro has failed to make a prima facie showing that the Determination of Jurisdiction was incorrect as a matter of fact or law.

After reconsideration of its Determination, the Board reaffirms its decision. Delpro's request for a hearing is denied.

By direction of the NATIONAL MEDIATION BOARD.

/s/ ROWLAND K. QUINN, JR.

Rowland K. Quinn, Jr.
Executive Secretary

cc: Mr. James E. Laramy
Mr. Ray J. Schoonhoven
Mr. O. W. Jacobson
Mr. Thomas A. Woodley
Mr. Anthony F. D'Avanzo

RKQ/dca

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

CASE NO. R-5146

CERTIFICATION

December 17, 1980

In the Matter of the

REPRESENTATION OF EMPLOYEES
of
DELPRO, INC.

Carmen, Helpers and Apprentices

The services of the National Mediation Board were invoked by the Brotherhood Railway Carmen of the United States and Canada, AFL-CIO-CLC (BRC), on August 20, 1980, to investigate and determine who may represent for the purposes of the Railway Labor Act, as provided by Section 2, Ninth, thereof, personnel described as "Carmen, Helpers and Apprentices", employees of Delpro, Inc.

At the time this application was received, these employees were not represented by any organization or individual.

The Board assigned Board Representative Samuel J. Cognata to investigate.

FINDINGS

The investigation disclosed that a dispute existed among the craft or class of Carmen, Helpers and Apprentices, and by direction of the Board the Board Representative was instructed to conduct an election by secret ballot to determine the employees' representation choice.

The following is the result of the election as reported by Board Representative Roland Watkins, who was assigned to count the ballots in this case.

Number of Employees Voting:

	BRC	Any Other Org. or Individual	Number of Employees Eligible
Carmen, Helpers & Apprentices	103	1*	124

The National Mediation Board further finds that the Carrier and employees in this case are, respectively, a Carrier and employees within the meaning of the Railway Labor Act, as amended; that this Board has jurisdiction over the dispute involved herein; and that the interested parties, as well as the Carrier, were given due notice of the Board's investigation.

CERTIFICATION

NOW, THEREFORE, in accordance with Section 2, Ninth, of the Railway Labor Act, as amended, and based upon its investigation pursuant thereto, the National Mediation Board certifies that the Brotherhood Railway Carmen of the United States and Canada, AFL-CIO, has been duly designated and authorized to represent for the purposes of the Railway Labor Act, as amended, the craft or class of Carmen, Helpers and Apprentices, employees of Delpro, Inc., its successors and assigns.

By order of the NATIONAL MEDIATION BOARD.

/s/ ROWLAND K. QUINN, JR.

Rowland K. Quinn, Jr.
Executive Secretary

*1 vote cast for William J. Kulick, Individual.

RKQ/dca

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action Nos. 81-103/81-106
Consolidated

DELPRO COMPANY,

Plaintiff,

v.

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, et al.,

Defendants.

ORDER

This 7th day of August, 1981, for the reasons stated in the accompanying Opinion issued this date,

IT IS ORDERED THAT:

1. Summary judgment shall be entered in favor of the National Mediation Board and the Brotherhood Railway Carmen of the United States and Canada on the issue of Delpro Company's status as a carrier under the Railway Labor Act.

2. The Brotherhood Railway Carmen and Delpro Company shall file within ten days an agreed proposed form of permanent injunction in accordance with the Court's Opinion. If Delpro Company and the Brotherhood Railway Carmen are unable to agree on a proposed form of permanent injunction, each shall file its own proposed form of permanent injunction and, within five days thereafter, a memorandum of not more than two pages explaining the deficiencies in its opponent's proposed form of permanent injunction.

/s/ MURRAY M. SCHWARTZ

United States District Judge

SCHWARTZ, District Judge

This case is a consolidation of two separate actions — one brought by Delpro Company ("Delpro") against the Brotherhood Railway Carmen of the United States and Canada ("Brotherhood Railway Carmen" or "BRC") and the National Mediation Board of the United States ("NMB" or "Board"), and another brought by the Brotherhood Railway Carmen against Delpro. Since both actions presented questions regarding Delpro's status as a "carrier" under the Railway Labor Act (the "Act"), they were consolidated pursuant to Rule 42(a) of the Federal Rules of Civil Procedure. Delpro is seeking a declaratory judgment that it is not a "carrier" under the Act, as well as injunctive relief, while the Brotherhood Railway Carmen seeks preliminary and permanent injunctive relief that would compel Delpro to recognize it as the representative of certain Delpro employees and to "treat", or bargain, with it as required by the Railway Labor Act.[1] Now before the Court are motions for summary judgment filed by the NMB and the Brotherhood Railway Carmen in the action brought by Delpro, and a motion for a preliminary injunction originally sought by the Brotherhood Railway Carmen in the action it filed. In addition, Delpro has filed with its brief in opposition to the summary judgment motions of the NMB and the BRC its own cross-motion for summary judgment.

Procedural History

The Brotherhood Railway Carmen, on August 20, 1980, filed with the National Mediation Board an application pursuant to Section 2, Ninth, of the Railway La-

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[1] The BRC and Jack Weatherlow, a former Delpro employee, also raise the claim that Weatherlow was discharged by Delpro in violation of the Railway Act. The discriminatory discharge claim is not within the scope of the motions before the Court.

bor Act[2] requesting the Board to investigate an alleged representation dispute among Delpro's employees. The Board's investigation included an inquiry into whether Delpro is a "carrier" within the meaning of the Act.[3] During the course of the investigation Delpro made written submissions to the NMB in support of its position that the NMB lacked jurisdiction over it because it is not

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[2] Section 2, Ninth, of the Railway Labor Act, as amended, 45 U.S.C. §152, Ninth, provides:

> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

[3] Section 1, First, of the Act, 45 U.S.C. §151, First, provides *inter alia:*

> The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any car-

a "carrier." The NMB on October 1, 1980, issued a Determination of Jurisdiction in which it found that both Delpro and its parent corporation, Trailer Train Company ("Trailer Train"), are carriers within the meaning of the Railway Labor Act. The Board assumed jurisdiction over Delpro and directed that a Board Representative be assigned to complete the investigation of the alleged representation dispute. Delpro immediately notified the NMB that it intended to seek reconsideration of the Board's determination of jurisdiction and requested either a formal hearing or the opportunity to submit evidence and legal authorities on the issue. On October 8, 1980, by leave of the Board, Delpro filed a formal Petition for Reconsideration, with supporting affidavits and exhibits, in which it requested the NMB to overrule its determination of jurisdiction or to order a formal hearing on the matter. The Board denied Delpro's petition on October 15, 1980, concluding that the materials submitted by Delpro did not support its contention that it is not a carrier.

On October 23, 1980, Delpro commenced an action in this Court against the National Mediation Board, alleging that the Board had exceeded its statutory jurisdiction, and seeking a declaratory judgment that it is not a carrier, as well as related injunctive relief. On December 17, 1980, while that action was pending, the NMB certified the Brotherhood Railway Carmen as representative of the class of carmen, helpers and apprentices at Delpro. This Court, on March 6, 1981, issued an opinion and order which, although rejecting the Board's argument that the Court lacked jurisdiction to review the NMB's determination of jurisdiction, dismissed the action on the ground that the absence of the Brother-

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rier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad. . . .

hood Railway Carmen from the action would have precluded the Court from entering a judgment that would finally resolve the question of Delpro's status as a carrier. *See Delpro Company v. National Mediation Board*, 509 F. Supp. 468 (D. Del. 1981).

The present litigation began on March 11, 1981, when Delpro filed its complaint seeking declaratory and injunctive relief against the NMB and the Brotherhood Railway Carmen. The BRC filed its action on March 12, 1981. Thereafter the NMB and the BRC moved for summary judgment against Delpro, and the BRC sought a preliminary injunction. The two actions were consolidated by an order of the Court filed on July 13, 1981. The Board and the BRC contend that they are entitled to summary judgment because undisputed facts developed in the administrative process establish Delpro's status as a carrier under the plain meaning of the Railway Labor Act. The BRC seeks by way of preliminary injunction to compel Delpro to commence labor negotiations and to provide the BRC with information needed for purposes of collective bargaining. Consideration of these motions has been delayed because of discovery disputes and other procedural skirmishes.

Standard of Review

Before addressing the merits of the questions raised, it is appropriate to first set out the appropriate standard for review of NMB jurisdictional decisions. In a prior related action this Court, although recognizing that federal courts have very limited power to review actions of the National Mediation Board, concluded that a court may consider an employer's contention that the Board had no power to act at all because the employer was not a "carrier" within the Board's statutory jurisdiction. *Delpro Co. v. National Mediation Board*, 509 F. Supp. 468, 472-75 (D. Del. 1981). The Court's power to review the Board's conclusion that Delpro is a carrier under the Act is not, however, unlimited.

The starting point in determining the appropriate standard of review is a careful analysis of just what is being reviewed. A Board determination of carrier status requires both findings of fact and conclusions of law. First, the Board must make factual findings on such issues as the nature and organizational structure of an employer's business and the type of work its employees do. Second, the Board must make conclusions of law in determining whether a company's business organization and activities qualify it as a "carrier" under Section 1, First, of the Railway Labor Act. The Court considered the proper scope of judicial review in the context of a discovery dispute earlier in this litigation.[4] There the Court determined that the Board's factual findings should be reviewed under the "arbitrary and capricious" test set out in section 706(2)(A) of the Administrative Procedure Act, 5 U.S.C. §706(2)(A).[5] In applying this test the Court must determine whether the agency "decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). The focal point for this review is the administrative record, which must be examined to determine whether it supports the agency's findings. *Camp v. Pitts*, 411 U.S. 138, 142-43 (1973) (per curiam). In the context of this case, the Court must determine if the Board looked to the relevant factors for imposing carrier status and whether its findings of fact in this regard are supported by the record. To the extent that a determination of the relevant factors is based upon a construction of the applicable provisions of the Railway Labor Act the

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[4] *See* Delpro Co. v. Brotherhood Railway Carmen of the United States and Canada, Consol. C.A. No. 81-103, slip op. at 2-4 (D. Del. July 13, 1981).

[5] §706(2)(A) authorizes the Court to set aside agency findings and conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

Court may apply its own interpretation of that statute.[6] It is well established, however, that the construction of a statute by the administrative body charged with its administration or execution is entitled to considerable deference. *See, e.g., FCC v. WNCN Listeners Guild,* 101 S.Ct. 1266, 1276 (1981); *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 381 (1969); *Udall v. Tallman,* 380 U.S. 1, 16 (1965). In view of the National Mediation Board's experience in administering and applying the Railway Labor Act and its knowledge of the railroad industry, that deference is no less applicable in this case.

Statutory Definition of "Carrier"

> The Railway Labor Act defines a "carrier" as any express company, sleeping-car company, carrier by railroad subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad . . . .
>
> 45 U.S.C. §151, First.

The parties agree that Delpro is a carrier under this statute only if it satisfies a two part test, consisting of the "ownership or control" requirement and the "function" requirement. First, Delpro must be (a) owned by, (b) controlled by, or (c) under common control with, a carrier by railroad. Second, Delpro must (a) operate equipment or facilities, or (b) perform any service, in connection with the transportation, receipt, delivery, elevation,

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[6] 5 U.S.C. §706 provides in pertinent part that "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."

transfer in transit, refrigeration or icing, storage, and handling of property by railroad.

In applying the first, or "ownership or control," aspect of this test, the Board focused on Delpro's corporate relation to Trailer Train, its parent, and to Trailer Train's stockholders. In applying the second, or "functional" aspect of the test, the Board focused on Delpro's provision of services which facilitate transportation of property by rail. For the reasons explained below the Court finds that these were the relevant factors to consider in the context of this case and that the Board's findings regarding material facts are supported by the record. The National Mediation Board and the Brotherhood Railway Carmen are therefore entitled to the entry of summary judgment in their favor.

Ownership or Control

Uncontroverted evidence in the administrative record established the following facts, which are in material respects not disputed by Delpro. Delpro is a wholly owned subsidiary of the Trailer Train Company.[7] Trailer Train owns the largest private fleet of railroad flatcars in the United States which it leases on a pooled basis to American railroads.[8] The stock of Trailer Train

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[7] Except where otherwise noted, all facts in this paragraph are taken from the Trailer Train Prospectus of May 13, 1980, submitted by Delpro to the National Mediation Board as an exhibit to its Petition for Reconsideration. This is included in the administrative record. *See* Doc. No. 29A.

[8] Trailer Train was incorporated by two railroads in 1955. Its origin is explained in the Trailer Train prospectus:

> The concept of a nationwide fleet of flatcars originated when railroads sought to combine the cost advantages of long haul rail transportation with the origin and terminal flexibility of trucking. The plan required a large number of cars, readily interchangeable among railroads and capable of transporting highway trailers in high mileage service under widely varying operating conditions. Efficient implementation of the plan required standardized design, heavy duty construction and vol-

is owned by twenty-nine operating railroads, the trustees of two former operating railroads and one freight forwarding company. Nearly all of the directors of Trailer Train are senior officers of the railroads holding interests in Trailer Train.[9] Only Trailer Train stockholders are eligible to participate in its flatcar pool. Railbox, a Trailer Train subsidiary, operates a pool of railroad boxcars that is not restricted to Trailer Train stockholders.[10] At least as of May 1980, car hire charges for Trailer Train and Railbox were set "at levels sufficient to meet the ordinary and necessary expenses of Trailer Train and Railbox, to establish for Trailer Train and Railbox financial positions enabling them to finance necessary car acquisitions on reasonable terms, and to keep the respective pools in the proper condition for operation at the highest point of efficiency."[11] Trailer Train's car contracts with railroads make Trailer Train responsible for maintenance of the leased equipment. Major maintenance work on equipment leased by Trailer Train is performed in substantial part by four wholly owned maintenance subsidiaries. Delpro is one of these subsidiaries, and Delpro's business operations are limited to repair of railroad cars owned by Trailer Train.

The Court is satisfied that the NMB was justified in concluding, based upon the above undisputed facts, that

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NOTE 8 — *(Continued)*

ume purchasing. Trailer Train was organized to acquire, finance and maintain a fleet of such cars.

See Doc. No. 29A (Exhibit C to Delpro's Petition for Reconsideration).

[9] *See* Exhibits 1 & 3 to the Verified Statement of C.D. Buford, President of Trailer Train, before the Interstate Commerce Commission dated October 19, 1979 (lists of stockholders and directors of Trailer Train as of that date).

[10] According to the Trailer Train May 1980 Prospectus, Railgon, another subsidiary, was scheduled to commence operations with a pool of gondola cars in late 1980 or 1981. That pool also would not be restricted to Trailer Train stockholders.

[11] *See* Trailer Train May 1980 Prospectus at 16.

Delpro is "directly or indirectly owned . . . by . . . any carrier by railroad. . . ." The stock of Trailer Train is held almost entirely by railroad companies that indisputably qualify as "carriers."[12] Delpro, as a wholly owned subsidiary, is therefore indirectly owned by a group of carriers by railroad. It is unimportant that Delpro is owned by a group of carriers, rather than by a single rail carrier. 1 U.S.C. §1, which provides rules of construction for federal statutes, expressly provides that "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise — words imparting the singular include and apply to several persons, parties or things. . . ." There is no evidence that Congress intended to limit the term carrier to the singular in this context. Therefore, because such a literal reading of the statute would not further the Railway Labor Act's purpose of avoiding disruptions of interstate commerce as a result of labor disputes in the rail industry,[13] the Court concludes that "carrier" should not be limited to the singular.

It is also evident that Delpro satisfies the alternative test of being controlled by a group of carriers by railroad. Uncontroverted evidence showed that nearly all of Trailer Train's directors are senior officers of railroad shareholders. The fact that these railroads own nearly all of the stock of Trailer Train, and are represented on Trailer Train's board by their officers, establishes beyond question that these carriers "control" Trailer Train and its subsidiaries, including Delpro. Concededly, no one rail carrier could control Trailer Train or Delpro in the sense of manipulating those companies to further its interests at the expense of other shareholders. It is

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[12] Delpro itself urged in its complaint that the ownership interests of shareholders other than carriers by rail are insignificant ("TTX is not owned and controlled by any one rail carrier but rather its stockholders are, with a couple minor exceptions, some 29 competing rail carriers. . .). Complaint (Doc. No. 1) at 5.

[13] *See* 45 U.S.C. §151a.

enough, in my view, that the shareholding rail carriers may jointly control Trailer Train and Delpro to further their mutual interests. Nor does the Court finds any basis for concluding that the only type of "control" contemplated by the statute is direct supervision by a railroad of another company's day-to-day business operations or employment policies.[14] In this case the stockholding railroads control Delpro because, through their representatives on Trailer Train's Board of Directors, they are able to determine the corporate policies of Delpro.

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[14] There are a number of recent NMB cases which have applied a "control" test which looked at the degree to which a carrier influenced a contractor's day-to-day operations. *See, e.g.*, Ground Services, Inc. (San Diego), 7 N.M.B. No. 266 (1980); Missouri-Illinois Central Industries, Ltd., 7 N.M.B. No. 256 (1980); Boeing Airport Equipment, Inc., 7 N.M.B. No. 193 (1980). However, in none of these cases did the carrier have any ownership interest in the contracting company. Thus a different type of analysis was appropriate to determine whether a carrier controlled employees of a contractor who performed services traditionally performed by employees of carriers. In this case, the stockholding railroads control Delpro through their interlocking corporate relationships.

To the extent that Great Lakes Airlines, Inc., 4 N.M.B. 5 (1961), might support Delpro's position that a subsidiary of a carrier which performs repair work for its parent is not itself a carrier, the Court perceives no unfairness to Delpro in the NMB's decision to overrule that decision. The interpretation given the statute by the Board comports with its plain meaning. Moreover, administrative agencies, like courts, must be free to reconsider prior decisions in light of changing circumstances and developments in the law. In denying Delpro's Petition for Reconsideration the Board stated that it has been reexamining its jurisdictional standards "in light of changing corporate relationships and increasing use of contractors to perform work integral to rail and air transportation." A glance at the list of the carrier-shareholder participants in the Trailer Train pool makes plain that many of the nation's major rail carriers have elected to obtain a significant amount of their rail car needs from the Trailer Train pool in lieu of owning and maintaining their own cars. In these circumstances, the Court finds nothing unprincipled about the Board's decision.

The Function Test

Likewise, the Court is satisfied that the repair of railroad cars, a function essential to the operation of any railroad, constitutes the performance of a service in connection with the transportation of property by railroad. As has been aptly stated by another court construing a nearly identical statute, "[i]t is difficult to conceive of any supporting activity that is more inherent or vital to the sustained functioning of a railroad system than the repair and construction of its rolling stock." *Despatch Shops, Inc. v. Railroad Retirement Board*, 153 F.2d 644, 646 (D.C. Cir. 1946). If a railroad did not participate in the type of cooperative arrangement provided by Trailer Train, it would have to otherwise obtain and provide for the repair its own fleet of railroad cars. Indeed, the National Mediation Board indicated in its determination of jurisdiction that rail carriers historically owned and maintained their own cars. No one contends that workers engaged in the repair of railroad cars would not be covered by the Railway Labor Act if employed directly by a rail carrier. The statute does not require that these workers be excluded from such coverage simply because they are employed by a corporation formed as a joint venture by a group of rail carriers.

CONCLUSION

In sum, the Court concludes that the National Mediation Board considered the relevant factors in assessing Delpro's status as a carrier and that its material factual findings are fully supported by the administrative record. The Board properly concluded that Delpro's business activities and its corporate ties to a large group of

rail carriers qualified it as a "carrier" within the plain meaning of the Railway Labor Act.[15]

Because Delpro is a carrier, the Brotherhood Railway Carmen is entitled to an injunction compelling Delpro to "treat with" it. *Virginia Railway Co. v. System Federation*, 300 U.S. 515 (1937). The Brotherhood Railway Carmen has, however, moved only for preliminary injunctive relief, and not the permanent injunction authorized by the Railway Labor Act. Rather that enter preliminary relief at this stage, the Court will await the filing by the Brotherhood Railway Carmen of an appropriate pleading and proposed form of permanent injunction, on notice, at which time it will enter a statutory injunction pursuant to the Railway Labor Act.

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[15] The Court has considered all other arguments raised by Delpro and has found them to be without merit. In particular, the Court finds unavailing Delpro's argument that the Interstate Commerce Commission's prior determination that Trailer Train is not a commn carrier under the Interstate Commerce Act, 49 U.S.C. §1, is dispositive of Delpro's status as a carrier under the Railway Labor Act. On its face, the Railway Labor Act plainly extends both to companies that qualify as carriers under the Interstate Commerce Act, and those that fall within the specific standards laid out in 45 U.S.C. §151, First.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action Nos. 81-103/81-106
Consolidated

DELPRO COMPANY,

Plaintiff,

v.

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, et al.,

Defendants.

ORDER GRANTING PERMANENT INJUNCTIVE RELIEF

In accordance with the Opinion and Order of this Court dated August 7, 1981, authorizing the entry of summary judgment Delpro Company pursuant to the Railway Labor Act, it is now this 28th day of August,

ORDERED that Delpro Company, its agents, officers, directors, representatives, employees, servants, attorneys and all those acting on its behalf or in concert with it shall exert every reasonable effort to make an agreement with and to bargain in good faith with the Brotherhood Railway Carmen of the United States and Canada, the duly certified collective bargaining representative of the employees of Delpro Company, pursuant to the provisions of the Railway Labor Act.

/s/ MURRAY M. SCHWARTZ

United States District Judge

JUDGMENT TO BE REVIEWED

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2475

DELPRO COMPANY

v.

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, AFL-CIO: LOCAL LODGE OF BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, AFL-CIO; and NATIONAL MEDIATION BOARD OF THE UNITED STATES OF AMERICA

(D. C. Civil No. 81-103)

JOHN TAYLOR, individ. and as representative Delpro Company, DAN LENTZ, individ. and as representative of Delpro Co., DAN MILLER, individ. and as representative of Delpro Co.

v.

JACK WEATHERLOW, individ. and Vice Chairman Brotherhood Railway Carmen Local Affiliate

(D.C. Civil No. 81-106)

DELPRO COMPANY,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Present: GIBBONS, SLOVITER and BECKER
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel on April 2, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered August 7, 1981, be, and the same is hereby affirmed. Costs taxed against appellant.

ATTEST:

SALLY MRVOS
Clerk

April 13, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JULY 12, 1982

No. 81-2475

DELPRO COMPANY

Appellant

v.

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, AFL-CIO; et al.,
(D.C. Civil No. 81-103)
JOHN TAYLOR, indiv. and as representative of Delpro Company, et al.

v.

JACK WEATHERLOW, indiv. and Vice Chairman, Brotherhood Railway Carmen Local Affiliate
(D.C. Civil No. 81-106)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*

The petition for rehearing filed by Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority

of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ JOHN J. GIBBONS

Judge

Dated: May 14, 1982

STATUTES INVOLVED

1. *Railway Labor Act*

   a. §1, First, 44 Stat. 577 (1926):

   The term "carrier" includes any express company, sleeping car company, carrier by railroad, subject to the Interstate Commerce Act, including all floating carriers, e.g., such as boats, barges, tugs, bridges and ferries and other transportation facilities used by or operated in connection with any such carrier by railroad, and any receiver, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier" . . .

   b. §1, First, 48 Stat. 1185 (1934):

   The term "carrier" includes any express company, sleeping car company, carrier by railroad subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad . . .

   c. §2,48 Stat. 1186 (1934):

   The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein . . .

2. *National Labor Relations Act*

   a. §101, 61 Stat. 137 (1947):

   (2) the term "employer". . . shall not include . . . any person subject to the Railway Labor Act, as amended from time to time . . .

(3) The term "employee" . . . shall not include any individual employed by an employer subject to the Railway Labor Act, as amended from time to time.

3. *Interstate Commerce Act*

a. §400, 41 Stat. 474 (1920):
(3)(a) . . . The term "transportation" as used in this chapter shall include . . . all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

4. *Revised Interstate Commerce Act*

a. 92 Stat. 1338 (1978):

(24) "transportation" includes — . . .

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing ventilation, storage, handling, and interchange of passengers and property.